

In the Matter of Arbitration

Between

U.S. Dept. of Justice
Federal Bureau of Prisons
FCC Victorville CA
and

AFGE Council of Prison Locals,
AFL-CIO, Local 3969
FCC Victorville CA

DATES: June 13, 14, July 2,
2007

FMCS CASE #: 07-52037

Overtime Grievance

BEFORE: David P. Beauvais, Arbitrator

APPEARANCES:

For the U.S. Dept. of Justice, FBOP: Michael A. Markiewicz, LRS

For the AFGE: Joselyn Stotts, Coplin & Heuer

PLACE OF HEARING: Federal Bureau of Prisons Offices, 13777 Air
Expressway Blvd., Victorville, CA 92394.

DATE OF FINAL AWARD: February 27, 2008

The Agency violated the Master Agreement when assigning overtime in the
Unicor Department from September 2006 thru July 2007. The grievance is
sustained.

Arbitrator

INTRODUCTION

This Arbitration proceeding arises pursuant to the 1998-2001 master agreement (the parties stipulated the agreement has been extended and is currently in force) between Federal Bureau of Prisons (hereinafter the Agency or Employer) and the Council of Prison Locals, American federation of Government Employees, Union Local 3969 (hereinafter the AFGE or the Union). The undersigned was selected as Arbitrator in accordance with procedures set forth by the Federal Mediation and Conciliation Service. Pursuant to the parties' agreement in Article 32, Section h of the Master Agreement, the Arbitrator's decision is final and binding.

The hearing was conducted on June 13 and 14, and July 2, 2007, at the Federal Bureau of Prisons Offices, 13777 Air Expressway Blvd., Victorville, CA 92394. The hearing commenced at 9:15 a.m. on June 13, 2007 and concluded at 11:32 a.m. on July 2, 2007. The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, and to examine and cross-examine witnesses. All witnesses testified under oath. The parties submitted four joint exhibits. Additionally, the Agency submitted twelve exhibits and the Union submitted twenty-five exhibits during the course of the hearing. These documents were received and made part of the record.

The advocates fully and fairly represented their respective parties. Michael A. Markiewicz, Labor Relations Specialist, represented the Agency. Jocelyn Stotts, of Coplin & Heuer represented the Union. There was an issue regarding the timeliness of the grievance, which was addressed in an interim award. The parties agreed to submit briefs on the limited issue of timeliness. It was agreed the briefs would be sent to the Arbitrator via U.S. Mail by close of business on August 24, 2007, and that the Arbitrator would render a decision before September 14, 2007. The Agency's brief was received on August 20, 2007, and the Union's brief was received on August 27, 2007.

In the interim award, issued August 31, 2007, the Arbitrator ruled that the extent of liability in this case was from September 6, 2006 to July 3, 2007. The Arbitrator further ruled that the Agency had withheld relevant

documentation necessary for the Union to prove its case. As remedy, the Arbitrator ordered the Agency to provide the Union with all relevant documentation, including time records, seniority standings, and relevant emails regarding overtime assignments for the period of September 6, 2006 to July 3, 2007.

The Agency was also ordered to provide up to forty (40) hours of official on-the-clock time to a person or persons designated by the Union to review, analyze and prepare a summary for use in the final Union brief. The parties subsequently conducted a teleconference to determine a date for submission of briefs. By request of the parties, the date for submission was postponed twice, with final submission set for January 11, 2008.

The Agency's brief was received on January 14, 2008, and the Union's brief was received on January 15, 2008. An additional exhibit was received from the Agency (with the Arbitrators approval) on January 22, 2007, whereupon the record was closed. Subsequently, the Arbitrator requested and received from the parties a thirty-day extension for submission of the award due to unexpected eye surgery.

ISSUE

Did the Agency violate the Master Agreement when assigning overtime in the Unicolor Department? If so, what is the appropriate remedy?

BACKGROUND

This Grievance was filed on October 16, 2006, alleging violations of Article 18, Hours of Work, Section p, Overtime Procedures. Shop Steward Donny Stipe, who was present throughout the hearing, and testified on behalf of the Union, filed the grievance. The formal grievance form (jt. ex. 2) is signed by J. L. Norwood, and dated 10/16/06. Additionally the form is date stamped with the same date.

Warden J. L. Norwood denied the grievance in a three-page letter dated November 15, 2006. The Union subsequently advised the Agency that they intended to arbitrate the dispute in a letter dated December 5, 2006. The Arbitrator was notified of his appointment to hear the matter in a letter from the FMCS dated February 1, 2001.

The grievance was filed as a class action, on behalf of all foremen working for the Unicor Department within the facility. The Unicor Department refurbishes military equipment, using prison labor. While prisoners are working on the various pieces of equipment, the foremen supervise them. The foremen are all trained in the security aspect of supervising and dealing with prisoners. Additionally, most of the foremen have background or experience in automotive repair, mechanics, or electrical repair. At the time the grievance was filed, the Unicor Department had expanded from one facility to three facilities. The number of foremen increased from eight or nine to about twenty-five.

POSITION OF THE PARTIES

AFGE

The Union argues that the Agency has failed to distribute overtime in the Unicor department in a fair and equitable manner. The Union points out that overtime in this unit has been a matter of controversy for a number of years, and with the expansion of the facility in 2006, the assignment of overtime became an even larger issue.

The Union also asserts that the Agency's attempts to "fix" the system were woefully inadequate, were unilaterally instituted, and failed to provide a reasonable and equitable method for foremen to be notified of overtime opportunities, sign-up for, and work overtime.

The Union also points out that the regular prison guards have an automated system in place for overtime assignment. This system is accessible from each guard station. The Union argues that although a similar system has been put in place for the foremen, there are still problems with access, which is limited to a few computers. Additionally, as of the commencement of the hearing, no formal training in how to use the system had been provided to the foremen.

As remedy, the Union requests compensatory overtime be awarded to the foremen for numerous missed opportunities, as well as attorneys fees.

FBOP

The Agency contends that no violation has occurred. The Agency argues that prison work by its very nature is unique because of security concerns in supervising and handling prisoners on a daily basis. The Agency points out that the foremen are not only responsible for supervising prisoners during their work day, but they are also responsible for ensuring the tools used by the prisoners are closely monitored and checked.

The Agency further argues that during the start-up of the two additional facilities (the Federal Penitentiary and Federal Correction Center II) in early 2006 certain tasks required overtime by foreman who had the qualifications and experience to set up a tool room, or to supervise electrical and mechanical work.

The Agency asserts that as the Unicom Department expanded from one facility to three facilities, they responded to alleged problems regarding overtime assignment; first by utilizing an interim system through the timekeeper, and then by instituting a computerized system similar to that used by the prison guards.

ANALYSIS

The Arbitrator has carefully reviewed the evidence of record, the testimony of witnesses at hearing, the post-hearing briefs, and the overtime analysis prepared by the Union and reviewed by the Agency. The Arbitrator finds that the Union, by a preponderance of evidence, has established that the Agency violated the Master Agreement when assigning overtime between September 6, 2006 and July 3, 2007. The Arbitrator's reasoning and analysis follows.

INFORMATION REQUEST ISSUE

In the Interim arbitration award dated August 31, 2007, the Arbitrator found that the Agency withheld relevant information from the Union that prevented them from fully developing their case. To remedy that situation, the Arbitrator ordered the Agency to release relevant records, documents and emails to the Union. The Arbitrator also ordered up to forty hours of official time for the Union to review and analyze the information.

Although the Arbitrator believes he took reasonable steps to “level the playing field” in this case, it must be observed that it should not have been necessary for the order in the first place. The initial information requests made by the Union were reasonable and necessary in order to file and process a grievance. Contrary to Associate Warden Werlinger’s assertion that the request lacked specificity and was overly broad, the Arbitrator finds the request was legitimate and well within the bounds of reason. If, as the Associate Warden asserted in his March 5, 2007 letter, there were privacy act concerns regarding certain information, then it was incumbent upon the Agency to negotiate in good faith with the Union over release of that particular information, rather than deny the request outright.

The Arbitrator makes a specific finding that the information request was reasonable and relevant, was unreasonably denied by the Agency, and was, in and of itself, a violation of the Master Agreement.

LIMITATION OF LIABILITY

In the August 31, 2007 interim award, the Arbitrator ruled that the limitation of liability in this case extended from September 6, 2006, thru July 3, 2007. This ruling was consistent with the language found in Article 31, Section D, which provides that grievances must be filed within 40 calendar days of the alleged grievable occurrence.

The grievance was filed on October 16, 2006, but gave the date of the violation as March 1, 2006. The Arbitrator found that the Union was precluded from going back, in terms of remedy, beyond 40 days prior to filing the grievance, thus arriving at the September 6, 2007 date.

The Arbitrator also found that the Union had presented evidence of possible ongoing violations following the filing of the grievance, perhaps extending to the date of the hearing itself. The Arbitrator therefore ruled that this was an “ongoing” grievance, but limited liability to the day following the last day of hearing, July 3, 2007. This was done so that both parties would have the opportunity to review and analyze data for a specific period of time, and so there would be no questions about ongoing liability beyond July 3, 2007.

However, the Arbitrator notes that the Union asserts in their closing brief that there have been ongoing problems with the assignment of overtime to the Unitor staff even beyond July 3, 2007. If that is the case, given the

Arbitrator's ruling in the interim award, then the Union has every right to file an additional grievance or grievances covering alleged violations beyond July 3, 2007.

The Arbitrator notes that at the time of hearing, in June and July 2007, the parties were negotiating a new master agreement. Hopefully, the local parties will have, if they have not done so already, an opportunity to negotiate local procedures which will lead to a fair and equitable system of overtime assignment within the Unicolor Department.

INEQUITABLE DISTRIBUTION OF OVERTIME WITHIN THE UNICOR DEPARTMENT

At the outset, the Arbitrator observes that the Master Agreement provides the method for assignment of overtime in Article 18, Section P 1 and P2:

1. When Management determines that it is necessary to pay overtime for positions/assignments normally filled by bargaining unit employees, qualified employees in the bargaining unit will receive first consideration for these overtime assignments, which will be distributed and rotated equitably among bargaining unit employees, and
2. overtime records, including sign-up lists, offers made by the employer for overtime assignments, will be monitored by the Employer and the Union to determine the effectiveness of the overtime assignment system and ensure equitable distribution of overtime assignments to members of the unit. Records will be retained by the Employer for two (2) years from the date of said record.

Additionally, Section P provides the means for overtime assignment:
“Specific procedures regarding overtime assignments may be negotiated locally.”

The local parties are obliged to follow the method of overtime assignment found in the Master Agreement. Specifically, overtime assignments must be distributed and rotated equitably. But as the Agency pointed out in their closing brief, the local parties are free to negotiate a fair and equitable system based on their local conditions. Prior to the expansion of the Unicolor department in 2006, a logbook was utilized for eight or nine foremen then employed at the FCC I Unicolor facility and the correctional camp. The

logbook was kept at FCC 1, which caused some inconvenience for those foremen working at the camp. In fact, a grievance was filed and pursued to arbitration in 2001, alleging in part that overtime was not being distributed fairly and equitably.

Although the Union did not prevail in that arbitration, it certainly should have raised a red flag for Agency management when they planned to open two additional Unicor facilities on the prison site in 2006. Instead of proactively working with the Union to resolve overtime assignment issues before they reached the grievance stage, the Agency seemed to give little thought about the complexity of soliciting and assigning overtime opportunities among a staff that was rapidly increasing in size, and was now supervising four separate locations.

The move from a logbook to an interim procedure monitored by the time and attendance clerk was admittedly a stop-gap measure that failed to meet the needs of either party. Most disturbing is the fact that this move was completely unilateral on the part of the Agency. The Union was apparently never consulted or given an opportunity for input prior to the switch much less asked to negotiate. Similarly, the changeover to a computerized system seems to have been fraught with a number of problems, including lack of access and training.

As noted earlier in this award, at the time of the arbitration hearing the parties were in negotiations at the national level. Presumably, those negotiations have concluded, and the local parties have, or will have, an opportunity to negotiate a fair and equitable system for overtime distribution. There seemed to be a consensus from both parties that a computerized system similar to that utilized by the prison guards was desirable. Indeed, that type of system was being put in place. However, the Arbitrator observes that in order for this system to work, each member of the bargaining unit must have reasonable access to the system and adequate training in its use.

REVIEW OF THE TIME RECORDS AND APPROPRIATE REMEDY

The Arbitrator spent considerable time reviewing the information contained in the Union's summary of hours and the color-coded annotations provided by the Agency. The Arbitrator agrees with the Agency on one point; a single overtime assignment violation does not entitle each and every

employee in the bargaining unit to overtime for that violation. Indeed, the Union's position in this regard is completely without merit. If a foreman was improperly bypassed for an overtime opportunity, then a single foreman, and only one foreman is entitled to a remedy for each violation.

To adopt the Union's position regarding the appropriate remedy for the approximate ten months of liability violates the principle of restoring the grievant(s) to the status quo ante, and no further. Roughly calculated, the Union is asking the Arbitrator to pay the employees in the bargaining unit an overtime premium equivalent to approximately 65% of their straight-time work hours during the liability period. This is far out of proportion to the extent of the violations, and would amount to a prohibitively punitive remedy.

On the other hand, some type of monetary remedy is appropriate in this case. In the Arbitrator's opinion, an award ordering some type of make-up opportunities would simply be impractical, and would probably lead to further complaints among the members of the bargaining unit.

As a starting point, the Arbitrator reviewed the time records and the annotations provided by the Union and Agency. Where appropriate, the Arbitrator discounted hours when it was apparent that the Agency was making an effort to rotate the overtime, if the assignment required a special skill, or the assignment was de minimus in nature.

The review was further complicated by the fact that during the ten-month period of liability, nine additional foremen were hired to supervise the new facilities. The Arbitrator took that into consideration in apportioning the remedy. The Arbitrator does not warrant that the hours awarded in the remedy are an exact calculation of hours due to each employee. Based on the evidence presented by both parties, that would be virtually impossible. The Arbitrator made a good faith effort to make all the employees in the bargaining unit whole, based on what he believed to be clear violations in the assignment of overtime, less legitimate exceptions based on the need for special skills for some overtime. The length of service for each foreman during the period of liability was also factored in.

The Arbitrator divided the liability period into three parts to reflect the number of foreman on the rolls. Those three periods were September 6, 2006 to January 5, 2007; January 6 to April 13, 2007; and April 14 to July 3,

2007. The Arbitrator calculated a total of 407 hours of overtime that was improperly assigned, or where employees were clearly bypassed. The breakdown of those 407 hours over the three periods were as follows:

September 6, 2006 to January 5, 2007: 220 hours

January 6, 2007 to April 12, 2007; 159 hours

April 14 to July 3, 2007; 28 hours.

The overtime hours will be apportioned as follows:

Grant:	23.75 hours
Gomez:	23.75 hours
Stipes:	23.75 hours
Rawlins:	23.75 hours
Robinson:	23.75 hours
Barajas:	23.75 hours
Dekker:	23.75 hours
Garday:	23.75 hours
Redmond:	23.75 hours
Wagner:	23.75 hours
Halbeisen:	23.75 hours
Vandiver:	23.75 hours
Cicioria:	23.75 hours
Gonzalez:	23.75 hours
Peralta:	23.75 hours
Akers:	9.10 hours
Barela:	9.10 hours
Hernandez:	9.10 hours
Montiel:	9.10 hours
Peterson:	9.10 hours
Hamilton:	1.25 hours
Laskowski:	1.25 hours
Ortiz:	1.25 hours
Barber:	1.25 hours

AWARD OF ATTORNEY FEES AND EXPENSES

As part of their requested remedy, the Union has petitioned for reasonable Attorney fees and expenses. The Arbitrator also spent considerable time in researching this issue and reviewing the petition submitted by Union

Counsel. The Arbitrator concludes that a substantial portion (but not all) of the fees and expenses are justified, and recoverable under the back pay act as amended by the Civil Service Reform Act in 1979.

As a starting point, the Arbitrator finds that the Union was the prevailing party in this matter. The Agency clearly violated and disregarded the negotiated procedure for assignment and distribution of overtime in the bargaining unit. Further, as concluded earlier, the Agency severely prejudiced the Union's ability to prepare and present their case by unreasonably withholding relevant and necessary documents.

Upon review of the expenses submitted by Union Counsel, the Arbitrator finds them to be reasonable and related to the conduct of the case. Therefore the expenses shall be allowed in full. Likewise, the hourly rate billed appeared to be reasonable. However, the Arbitrator is reducing the amount of the Attorney fees for three reasons.

First, although the Union was the prevailing party in this matter, the remedy requested was greatly reduced from the Union's requested remedy of over 26,000 hours to 407 hours distributed to twenty-five members of the bargaining unit. Secondly, the Union's selection of an out-of-state attorney led to a substantial number (approximately 30% of the total) of travel hours. In the Arbitrator's opinion, the Agency should only be liable for the hours that would have reasonably been billed by a local attorney. Third, based on the Arbitrator's own experience acting as an advocate in similar cases, the amount of study and write-up time for the briefs seemed slightly excessive.

The amount of billable time is therefore reduced from 150.7 hours to 108.7 hours, or \$21,740. An additional amount of \$1606.82 in expenses is also awarded. The total amount of approved Attorney fees and expenses is \$23,346.82.

AWARD

The Agency violated the Master Agreement when assigning overtime in the Unicolor Department from September 2006 thru July 2007. The grievance is sustained. The remedy is as stated above. As stipulated by the parties, the Arbitrator shall retain jurisdiction regarding remedy for a period of 60 days from the date of the award.

DATE OF FINAL AWARD: February 27, 2008

Arbitrator